

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Paragon Communications, Inc. d/b/a Time Warner	)	
Cable	)	CSR 5721-E
	)	
Petition for Determination of Effective	)	
Competition in San Antonio, Texas (CUID No.	)	
TX0029)	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 12, 2007**

**Released: March 13, 2007**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. Paragon Communications, Inc. d/b/a Time Warner Cable ("Time Warner") has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(4) and 76.907 of the Commission's rules seeking a finding of effective competition in San Antonio, Texas ("San Antonio" or the "City").<sup>1</sup> Time Warner alleges that its cable system serving San Antonio is subject to effective competition pursuant to Section 623(a)(2) of the Communications Act of 1934, as amended ("Communications Act"),<sup>2</sup> and the Commission's implementing rules, and seeks revocation of the certification of the local franchising authority in the community to regulate basic cable service rates. Time Warner claims the presence of effective competition in the community from the competing services provided by Grande Communications, Inc. ("Grande"), a franchised cable operator affiliated with a local exchange carrier ("LEC") that also provides service to the community.<sup>3</sup> The City of San Antonio filed an opposition to which Time Warner replied. Time Warner also filed a Supplement.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>4</sup> as that term is defined by Section 76.905 of the Commission's rules.<sup>5</sup> The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.<sup>6</sup> Based on the record in this proceeding, Time Warner has met this burden.

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<sup>1</sup>See 47 C.F.R. § 76.7(a)(1) and 76.905(b)(4). The City of San Antonio is certified to regulate basic cable service rates.

<sup>2</sup>47 U.S.C. § 543(a)(2).

<sup>3</sup>47 U.S.C. § 543(a); 47 C.F.R. § 76.905(b)(4).

<sup>4</sup>47 C.F.R. § 76.906.

<sup>5</sup>47 C.F.R. § 76.905.

<sup>6</sup>See 47 C.F.R. §§ 76.906 & 907.

## II. DISCUSSION

3. Section 623(l)(1)(D) of the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if a LEC or its affiliate offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, provided the video programming services thus offered are comparable to the video programming services provided by the unaffiliated cable operator in that area.<sup>7</sup>

4. The Commission has stated that an incumbent cable operator could satisfy the “LEC” effective competition test by showing that the LEC is technically and actually able to provide services that substantially overlap the incumbent operator’s service in the franchise area.<sup>8</sup> The incumbent also must show that the LEC intends to build-out its cable system within a reasonable period of time if it has not already done so; that no regulatory, technical or other impediments to household service exist; that the LEC is marketing its services so that potential customers are aware that the LEC’s services may be purchased; that the LEC has actually begun to provide services; the extent of such services; the ease with which service may be expanded; and the expected date for completion of construction in the franchise area.<sup>9</sup>

5. Time Warner operates a cable television system in San Antonio, Texas for which it seeks a determination of effective competition. Time Warner has provided information demonstrating that Grande Communications Network, Inc., a wholly owned subsidiary of Grande, is a telephone company that provides local exchange and other telephone services within San Antonio.<sup>10</sup> Therefore, Grande’s wholly owned subsidiary Grande Communications Network, Inc. qualifies as a LEC, and Grande qualifies as an affiliate of a LEC for purposes of the LEC effective competition test.<sup>11</sup>

6. In addition to qualifying as a LEC, Grande entered into a nonexclusive fifteen-year cable franchise agreement with the City authorizing it to provide cable services throughout San Antonio beginning in June 2000.<sup>12</sup> Grande is required to provide service to at least 10 percent of the City within 24 months from the effective date of the franchise agreement, which would be June 2002.<sup>13</sup> An additional 25 percent of residents must be provided service by June 2004 with service provided to the remaining residents no later than June 2005.<sup>14</sup> During early 2001, Grande launched its services in San Antonio and Time Warner alleges that Grande has begun to service significant number of residents in areas where it has completed construction of its plant.<sup>15</sup> Grande has distributed marketing materials targeted to San Antonio residents informing them that they need only contact Grande for installation of its cable services.<sup>16</sup>

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<sup>7</sup>Communications Act, § 623(l)(1)(D), 47 U.S.C. § 543(1)(1)(D); *see also* 47 C.F.R. § 76.905(b)(4). This fourth statutory effective competition test within Section 632(l) may be referred to as the “LEC” effective competition test.

<sup>8</sup>*See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 (1999) (“Cable Reform Order”).

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

<sup>11</sup>*See* 47 U.S.C. § 543(1)(1)(D); 47 U.S.C § 153(a)(1).

<sup>12</sup>Time Warner Petition at 6 and Exhibit C at 1-4.

<sup>13</sup>Petition Exhibit C at 7-8.

<sup>14</sup>*Id.*

<sup>15</sup>*Id.* at 5 and Exhibit D.

<sup>16</sup>*Id.* at 5-7 and Exhibit A.

Additionally, Grande is required by its franchise agreement to complete construction of an San Antonio system with five years pursuant to a build-out set forth in the franchise agreement, or suffer a daily penalty of \$200.00 per day against a \$100,000 security fund.<sup>17</sup>

7. Grande's marketing materials show that its cable system offers over 100 channels of video programming that includes non-broadcast programming services such as A&E, CNN, Discovery Channel, HBO and Showtime, as well as a complement of over seven local television broadcast stations.<sup>18</sup> This complement of programming services compares closely with the programming available on Time Warner's system.<sup>19</sup> Therefore, Grande provides comparable programming as required by the "LEC" effective competition test.<sup>20</sup>

8. In opposition, the City of San Antonio does not dispute that Grande is affiliated with a LEC or provides comparable programming to Time Warner, it does however dispute that Grande has carried its burden of proving that Grande offers comparable service in Time Warner's franchise area.<sup>21</sup> The City of San Antonio agrees that there will be effective competition in the City if and when Grande satisfies the build-out milestones in its franchise agreement, however, it asserts that the system is still in the earliest stages of construction.<sup>22</sup> The City argues that "offer" under the LEC test requires that the LEC substantially overlap the services of the incumbent cable operator and Grande's service does not substantially overlap Time Warner's.<sup>23</sup> According to the City, Grande offers service to less than one percent (4,400) of San Antonio households while Time Warner's service passes all San Antonio households.<sup>24</sup> Thus, Grande's build-out in San Antonio is *de minimis* when compared to Time Warner's.<sup>25</sup> In addition, the City also argues that Time Warner has overstated the build-out schedule.<sup>26</sup> According to the City, the franchise agreement became effective on July 17, 2000 and Grande is required to offer service to at least 10 percent of the City by July 17, 2002, and an additional 25 percent by July 17, 2004.<sup>27</sup> Thus, the City considers the petition to be premature. Finally, the City argues that financial and market circumstances distinguish this case from previous Commission cases finding that the LEC test has been satisfied.<sup>28</sup>

9. In reply, Time Warner notes that the City concedes that Time Warner has met all of the elements of the LEC-affiliated test except for the requirement that Grande's system substantially overlaps Time Warner's system.<sup>29</sup> Time Warner disputes the City's claim that Grande's system does substantially

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<sup>17</sup>Petition at 5 and Exhibit C at 7-8.

<sup>18</sup>*Id.* at 7-8 and Exhibit B.

<sup>19</sup>*Compare id.* and Time Warner Petition at 7-8 and Exhibit G.

<sup>20</sup>*See* 47 C.F.R. § 76.905(g).

<sup>21</sup>Opposition at 2.

<sup>22</sup>*Id.*

<sup>23</sup>*Id.* at 3-4.

<sup>24</sup>*Id.*

<sup>25</sup>*Id.* at 5.

<sup>26</sup>*Id.*

<sup>27</sup>*Id.*

<sup>28</sup>*Id.* at 6-8.

<sup>29</sup>Time Warner Reply at 1.

overlap Time Warner's system.<sup>30</sup> Initially, Time Warner asserts that it does not concede that the "substantial overlap" requirement is consistent with the plain language of the LEC test, which does not include any minimum homes passes or penetration standard.<sup>31</sup> Nonetheless, Time Warner argues that the extent of Grande's current build-out in combination with the established construction plans is evidence that the system does overlap with Time Warner's system.<sup>32</sup> According to Time Warner, Grande's build-out is much more extensive than portrayed by the City and sufficient enough under prior Commission precedent to establish a finding of LEC test effective competition.<sup>33</sup> Furthermore, Time Warner's in-house engineering staff reviewed Grande's physical plant and concluded that the correct number of homes passed by Grande is actually 19,000 rather than the 4,400 figure used by the City.<sup>34</sup> Therefore, under prior Commission precedent, Grande satisfies the substantial overlap element of the LEC test.<sup>35</sup> Time Warner also argues that Grande's planned build-out and its actions to meet its franchise build-out obligations lead to the conclusion that the Grande system substantially overlaps Time Warner's system since the Commission has considered planned as well as actual service in reviewing LEC petitions.<sup>36</sup> Given Grande's current level of build-out and ongoing construction, Time Warner asserts that these targets should be easily met if not exceeded since they understate the scope of the build-out on actual homes passed.<sup>37</sup> Time Warner also asserts that Grande is a well-financed sophisticated cable over builder who has carefully targeted its roll-out in three large metropolitan areas and is aggressively expanding each project.<sup>38</sup> Finally, Time Warner argues that competition from Grande has resulted in it adding new programming and demonstrates the impact of MVPD competition in San Antonio.

10. In December 2005, the Commission requested that the parties update the record.<sup>39</sup> In response, Time Warner filed a Supplement. Grande withdrew its opposition.<sup>40</sup> The City did not file a response to Time Warner's Supplement.

11. Time Warner's Supplement argues that Grande's competitive viability remains strong as evidenced by its financial prosperity and continued expansion and purchase of related entities.<sup>41</sup> Time Warner cites various public filings to buttress its claim that Grande continues to be financially viable and continues to expand.<sup>42</sup> Time Warner states that Grande's public filings reflect a 9 percent increase of

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<sup>30</sup>*Id.*

<sup>31</sup>*Id.* at 2.

<sup>32</sup>*Id.*

<sup>33</sup>*Id.*

<sup>34</sup>*Id.* at 3 and Exhibit A.

<sup>35</sup>*Id.* at 3-4.

<sup>36</sup>*Id.* at 4-7.

<sup>37</sup>*Id.* at 6.

<sup>38</sup>*Id.* at 7-8.

<sup>39</sup>December 13, 2005 Letter from Steven A. Broecker, Deputy Chief, Policy Division, Media Bureau to Arthur H. Harding of Fleischman and Walsh, L.L.P., counsel for Time Warner, et al.

<sup>40</sup>January 10, 2006 Letter from Emily A. Denney of Cinnamon Mueller, counsel for Grande Communications, Inc. to Marlene Dortch, Secretary, Federal Communications Commission.

<sup>41</sup>Time Warner Supplement at 3-5.

<sup>42</sup>*Id.* Grande's operations, as reflected in publicly filed documents with the Securities and Exchange Commission, reflect strong growth and financial stability based on revenues, earnings, and Grande's projection of continuous rapid growth. Furthermore, Grande has been able to obtain financing to allow it to continue to grow as evidenced

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marketable homes passed and the number of customers served has increased by almost 11 percent.<sup>43</sup> Time Warner notes that in 2006, Grande converted its city-issued cable franchise into a state-issued Certificate of Authority under Texas' recently adopted State-Issued Certificate of Authority statute.<sup>44</sup> Time Warner further notes that Grande continues to offer multichannel video and full service telephone service in San Antonio that bundles local and long distance service at a discounted rate.<sup>45</sup> In addition, Grande is updating its high-speed broadband distribution network in San Antonio to offer more features and expand its broadband services to customers and is deploying a passive optical FTTH network in San Antonio, which is expected to pass 23,000 homes in 2006.<sup>46</sup> Time Warner alleges that these services offered by Grande operate in direct competition with its own services. Thus, all evidence indicates that Grande continues to have a significant and growing number of video subscribers in the San Antonio franchise area.

12. Time Warner's Further Supplement indicates that it researched the current state of Grande's build-out of its San Antonio system.<sup>47</sup> The research included a physical plant inspection, engineering review and the creation of a detailed map by Time Warner's local personnel in San Antonio. Time Warner provided a map of the City limits and highlighted Grande's system build-out as well as portions of the City under construction by Grande.<sup>48</sup> According to Time Warner, Grande's current build-out covers "well over 30% of the San Antonio area."<sup>49</sup> In addition, Time Warner asserts that soon after its petition was filed, Grande acquired U.S. Online, an multichannel video programming distributor ("MVPD"), which serves dozens of multiple dwelling units ("MDUs") and thousands of subscribers in various portions of San Antonio.<sup>50</sup> Many of U.S. Online properties are subject to exclusive contracts, which means that Grande now has the exclusive right to provide services to thousands of MDUs.<sup>51</sup>

13. Finally, Time Warner argues that in addition to Grande, MVPD competition is provided by DBS providers, DirecTV and DISH Network.<sup>52</sup> Time Warner requested and received zip code, occupied household and DBS subscriber data from Media Business Corp. for the City and DBS subscriber data from the Satellite Broadcasting and Communication Association.<sup>53</sup> Using this data, Time Warner applied the five-digit zip code allocation formula previously approved by the Commission and the evidence indicated that DBS providers serve 15.41 percent of the total households in San Antonio. Time Warner therefore argues that the combination of DBS and Grande subscribers reflect that 18.82 percent of San

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by its acquisition of U.S. Online Inc., an MDU-focused MVPD with subscribers in San Antonio and San Antonio in 2001 and over-builder ClearSource, Inc., with operations throughout Texas.<sup>42</sup> In 2003, Grande purchased 3000 miles of fiber spanning Texas, Oklahoma, Arkansas, and Louisiana from San Antonio-based C3 Communications.

<sup>43</sup>*Id.* at 4.

<sup>44</sup>*Id.* at 5-6.

<sup>45</sup>*Id.*

<sup>46</sup>*Id.*

<sup>47</sup>Further Supplement at 7-8.

<sup>48</sup>*Id.*

<sup>49</sup>*Id.*

<sup>50</sup>*Id.* at 8.

<sup>51</sup>*Id.*

<sup>52</sup>Time Warner Supplement at 8-10.

<sup>53</sup>*Id.*

Antonio households subscribe to an MVPD other than Time Warner.<sup>54</sup> Thus, Time Warner argues that it is arguably also subject to competing provider effective competition in San Antonio.

14. The City has conceded that Grande's operations satisfies all of the LEC test requirements except for the "offer" of services, which it asserts won't be satisfied until its system substantially overlaps that of Time Warner's service area. When the petition was filed, Grande offered service to 4,400 households. Since that time, however, Grande has continued to expand the number of subscribers and made major improvements to its system to compete with the other multichannel video programming distributors serving San Antonio. Although the map submitted by Time Warner is useful in documenting Grande's build-out, we are unable to verify the thirty percent build-out number asserted by Time Warner. The map is, however, evidence that supports Time Warner's argument that Grande continues to build-out its system and add subscribers. We also take into consideration Grande's purchase of U.S. Online which serves MDUs in the City. Time Warner has also produced evidence to indicate that Grande remains on a solid financial footing. We believe that Time Warner has satisfied its burden of demonstrating that Grande's service is "offered" in the San Antonio franchise area consistent with the LEC effective competition test. In addition, Time Warner has presented evidence that there are at least 62,493 DBS subscribers in the City. This is additional evidence that San Antonio residents have a growing choice among multichannel video programming distributors.

15. Time Warner demonstrated that Grande has commenced providing cable service within San Antonio, has marketed its services in a manner that makes potential subscribers reasonably aware of its services, and otherwise satisfies the LEC effective competition test consistent with the evidentiary requirements set forth in the *Cable Reform Order*.<sup>55</sup> Based on the foregoing, we conclude that Time Warner has submitted sufficient evidence demonstrating that its cable system serving San Antonio, Texas is subject to LEC effective competition.

### III. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed by Time Warner Entertainment-Advance/Newhouse Partnership **IS GRANTED**.

17. **IT IS FURTHER ORDERED** that the certification of the City of San Antonio to regulate basic service rates of Paragon Communications, Inc. d/b/a Time Warner Cable **IS REVOKED**.

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<sup>54</sup>*Id.*

<sup>55</sup>14 FCC Rcd at 5305.

18. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>56</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert  
Deputy Chief, Policy Division, Media Bureau

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<sup>56</sup>47 C.F.R. §0.283.